Supreme Court, U.S.
FILED
APR 19 1999
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No. 98-1311

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL HOLLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

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QUESTIONS PRESENTED

1. Whether Robert Coal's broad constitutional challenge to the Coal Act under the Due Process Clause and the Takings Clause was properly preserved in the courts below.

2. Whether, assuming the issue is properly before the Court, the Coal Act as applied to Robert Coal, a signatory of the 1974, 1978, and 1981 National Bituminous Coal Wage Agreements, violates the Due Process Clause or the Takings Clause of the Fifth Amendment.

3. Whether Robert Coal's 1988 settlement of a private contractual dispute with the United Mine Workers of America creates some separation-of-powers barrier to the imposition of statutory liability under the Coal Act for health care in 1993 and later years.

4. Whether the Settlors and Trustees of the United Mine Workers of America 1992 Benefit Plan are "Officers of the United States" for purposes of the Appointments Clause.

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STATEMENT OF THE CASE

It is, of course, highly implausible that a single court of appeals panel would, as petitioners assert, disregard "no fewer than three of this Court's landmark constitutional decisions." (Pet. 10.) Like most highly implausible assertions, this one is false. Petitioners' repeated protests against "evisceration" of this Court's precedents bear witness primarily to petitioners' own overblown rhetoric rather than any error by the court of appeals. Once the melodrama is laid aside, this case is revealed for what it really is: a parochial effort by a former coal operator to use the happenstance of an earlier contractual settlement as a shield against future statutory liability. The case presents no issue that warrants review in this Court.

A. The Coal Act

The several opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), addressed at some length the historical background of the Coal Industry

Retiree Health Benefit Act of 1992 (the "Coal Act").[1] We summarize that background only briefly here.

In the Coal Act, Congress sought to resolve a financial crisis that plagued the existing collectively bargained multiemployer health care system for retired coal miners and their dependents. Rather than leaving the subject to the vagaries and potential disruptions of future collective bargaining, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. Both of these new funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan"), were expressly required to be private plans of the kind described in Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), "employee welfare benefit plans" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1), and "multiemployer plans" within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37). 26 U.S.C. §§ 9702(a)(3), 9712(a)(2). The 1992 Plan, which is at issue in this case, generally provides benefits for those retirees and their dependents who, but for the enactment of the Coal Act, would be eligible to receive bene-

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[1] Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g., Unity Real Estate Co. v. Hudson*, 1999 WL 167765 (3d Cir. March 29, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) (*"ABC"*); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

fits from the pre-Coal Act 1950 UMWA Benefit Plan or 1974 UMWA Benefit Plan, based upon their age and service as of February 1, 1993. The 1992 Plan also provides benefits for those persons who are entitled to receive coverage from an individual employer plan under 26 U.S.C. § 9711, but who do not actually receive such coverage.[2] 26 U.S.C. § 9712(b)(2).

The 1992 Plan is funded through the assessment of premiums against employers whose retirees are receiving health coverage from the 1992 Plan under 26 U.S.C. § 9712 or from an individual employer plan under 26 U.S.C. § 9711. As pertinent here, the Coal Act provides that the coal industry employer that was a signatory to a National Bituminous Coal Wage Agreement ("NBCWA") and who last employed a particular retiree in the coal industry is responsible for paying monthly premiums for each such retiree who is a beneficiary of the 1992 Plan. 26 U.S.C. § 9712(d)(3).

B. Robert Coal's Involvement In The Coal Industry

Pursuant to management agreements with Leslie Coal Mining Company ("Leslie") and McInnes Coal Mining Company ("McInnes"), petitioner Robert Coal Company ("Robert") agreed to manage and supervise the construction, development, and operation of the Leslie and McInnes Mines in Pike County, Kentucky. Robert entered into its agreement with Leslie on January 1, 1974, and it entered into its agreement with McInnes on January 1, 1976. From the date of the respective management agreements until 1984, Robert employed all of the employees at the Leslie and McInnes Mines. (Pet. App. 9a.) Robert

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[2] The Combined Fund provides benefits for those retirees and their dependents who, as of July 20, 1992, were eligible to receive and were receiving benefits from the pre-Coal Act 1950 UMWA Benefit Plan or 1974 UMWA Benefit Plan. 26 U.S.C. § 9703(f). The Combined Fund is not at issue in this case.

was a signatory to the 1974, 1978, and 1981 NBCWAs. (Pet. App. 6a.)

Coal production at the Leslie and McInnes Mines ended in February 1983. Robert continued to maintain the Leslie and McInnes Mines until September 30, 1984, at which time the management agreements with Leslie and McInnes were terminated, and the mines sold. *Id.*

C. The Kentucky Litigation And Settlement Agreement

Shortly after the mines were sold, the United Mine Workers of America ("UMWA") filed suit in the United States District Court for the Eastern District of Kentucky against Robert, Leslie, and McInnes (the "Kentucky litigation"). The UMWA alleged that the sale of the mines violated the successorship provisions of the NBCWAs because the sellers had failed to obtain the purchaser's commitment to assume Robert's benefit funding obligations under the NBCWAs.

In May 1998, Robert and the UMWA entered into a settlement agreement ("the Settlement Agreement"). (Pet. App. 9a-10a, 41a). Under the Settlement Agreement, Robert agreed to continue providing health care coverage to its retirees until January 31, 1993 "in the same manner and amounts" as set forth in the 1984 NBCWA. (Pet. App. 43a.) In return, the UMWA waived any claim that Robert and its affiliates "were or are now bound by the 1988 Wage Agreement at the former Leslie and McInnes Mines at any time." *Id.* The Settlement Agreement further provided that, after January 31, 1993, Robert would not have any obligation to provide to its former employees or their dependents "any health or other non-pension benefits, arising out of any Wage Agreement . . . ." (Pet. App. 44a.)

As part of the Settlement Agreement, the parties entered into a Stipulation and Order of Dismissal With Prejudice ("the Stipulated Order"), which the district court approved

on May 27, 1988. (Pet. App. 38a.) Robert refers to the Settlement Agreement and Stipulated Order collectively as the "final judgment." Contrary to Robert's claim, however, the Stipulated Order entered by the court in the Kentucky litigation did not "expressly approve[] and incorporate[] by reference" the Settlement Agreement. (Pet. 4.) Rather, it simply noted that the court had been "duly advised of" and had previously approved the Settlement Agreement, and the Settlement Agreement was attached as an exhibit to the Stipulated Order. (Pet. App. 40a.) Nor, as Robert asserts, did the Stipulated Order "specifically decree" that Robert would have no obligation to provide any health benefits "arising out of any Wage Agreement" in the future. (Pet. 4.) Rather, it was the Settlement Agreement that so provided. (Pet. App. 44a.) Finally, Robert incorrectly asserts that it "satisfied all of its obligations under the Kentucky final judgment" (Pet. 4); in fact, the Stipulated Order imposed no obligations at all on Robert. Rather, Robert's obligations arose under the Settlement Agreement.

From May 1988 until January 31, 1993, Robert provided benefits to approximately 76 persons pursuant to the terms of the Settlement Agreement. In December 1992, Robert informed each of the beneficiaries receiving benefits under the Settlement Agreement that it would stop providing these benefits after January 31, 1993.

D. The Litigation Below

After enactment of the Coal Act, the 1992 Plan provided health benefits to the retirees previously employed by Robert at the Leslie and McInnes Mines. (Pet. App. 10a.) In accordance with the Coal Act, the Trustees assessed Robert monthly premiums for each beneficiary of the 1992 Plan for whom Robert was the last signatory operator to employ the retiree in question. 26 U.S.C. § 9712(d)(3). When Robert refused to pay the premiums, the Trustees sued. (Pet. App. 4a.) The United

States intervened in support of the Trustees. The Trustees and Robert each moved for summary judgment. Relying on the Settlement Agreement and Stipulated Order as the basis for its arguments, Robert asserted several constitutional grounds for its "as applied" challenge to the validity of the Coal Act. In particular, Robert argued that, because of its prior settlement with the UMWA, the Coal Act is invalid under the Due Process and Takings Clauses of the Fifth Amendment, the separation-of-powers doctrine, and the "vested rights doctrine." Robert also contended that the Coal Act is facially unconstitutional due to an alleged violation of the Appointments Clause. After full briefing, the district court granted summary judgment for the Trustees. (Pet. App. 5a.)

In its petition in this Court, Robert attempts to create the impression that it pursued in the courts below broad-based Due Process and Takings Clause challenges to the Coal Act, in terms generally applicable to post-1974 NBCWA signatories. Robert states, for example, that the district court rejected its claim that the Coal Act "violates the Fifth Amendment Takings and Due Process Clauses," and that the court ruled "[w]ithout the benefit of" this Court's decision in *Eastern* and "relied heavily" on several court decisions that are "inconsistent" with *Eastern*. (Pet. 7-8.) But Robert's arguments in the district court and in the court of appeals were far narrower than the petition suggests, and Robert expressly disclaimed reliance on *Eastern* in the court of appeals.

In the district court, Robert's due process and takings claims revolved exclusively around the rights that Robert purportedly obtained as a result of the Settlement Agreement and the Stipulated Order. For example, in support of its takings claim, Robert argued in its motion for summary judgment that:

> Any interpretation, application or enforcement of the 1992 Coal Act that serves to annul, nullify or take

> away the right obtained by Robert through the Final Judgment constitutes an unlawful Taking of property in violation of the Fifth Amendment, as applied to Robert.

(Robert's Memorandum of Law in Support of Its Motion for Summary Judgment, October 31, 1994, at 27) ("Robert Summary Judgment Motion"). In its opposition to the Trustee's motion for summary judgment, Robert similarly argued that:

> the attempted application of the Act to Robert constitutes a complete destruction or taking of the absolute and vested right obtained by Robert in the Kentucky Lawsuit discharging or terminating any such liability after January 31, 1993.

(Robert's Opposition to Trustees' Memorandum in Support of Their Motion for Summary Judgment, December 6, 1994, at 25-26) ("Robert Opposition").

Likewise, Robert's due process arguments in the district court revolved entirely around the impact of the Coal Act on Robert's purported rights under the Settlement Agreement and Stipulated Order. Thus, Robert conceded the Trustees' recitation of the "general propositions of law" applicable to due process claims, but contended that those propositions were "inapplicable to the instant case because they do not involve a due process inquiry based on a fact that is crucial here, *i.e.*, the fact that Robert Coal has rights obtained pursuant to a Final Judgment." (Robert Opposition at 20); *see also* Robert Summary Judgment Motion at 38-39 (arguing that Coal Act was arbitrary and irrational as applied to Robert because of the rights Robert purportedly obtained as a result of the Settlement Agreement and Stipulated Order).

Robert did not argue that the Coal Act violated its rights under the Due Process and Takings Clauses for any reason other than the effect the law allegedly had on the Settlement Agreement and Stipulated Order. Robert expressly distinguished its case from others upholding

the constitutionality of the Coal Act because, unlike the claims in those cases, Robert's claim turned exclusively on the rights that Robert allegedly obtained as a result of the Settlement Agreement and Stipulated Order. The district court correctly held that the Settlement Agreement and Stipulated Order provided no basis for holding the Coal Act unconstitutional as applied to Robert. (Pet. App. 13a-24a.)

After the district court's decision, but before briefing had commenced in the court of appeals, this Court issued its decision in *Eastern*.[3] Again, however, Robert focused its takings and due process claims exclusively on the effect of the Coal Act on its purported rights under the Settlement Agreement and Stipulated Order. (*See* Brief of Appellants (Robert), June 29, 1998, at 28, 36.)

Robert was fully aware of this Court's decision in *Eastern* when it filed its briefs in the court of appeals. In fact, Robert expressly distinguished this case from *Eastern*. (Brief of Appellants at 32.) Robert then argued that *Eastern* was nevertheless "relevant to" Robert's takings argument. Once again, however, Robert focused only on the impact of the Coal Act on the Settlement Agreement and Stipulated Order. *E.g.*, *id.* at 34 ("Robert Coal had legitimate settled expectations based on the Final Judgment which were unfairly upset by the Trustees' attempt to enforce the Coal Act as to it.").

Robert did not even mention *Eastern* in its due process arguments before the court of appeals. Nor, for that matter, did Robert cite that decision even once in its reply brief before that court, in support of either its takings or due process arguments. It is little wonder, then, that the court of appeals saw no need to expound upon the impact of *Eastern* on Robert's situation. Instead, after full brief-

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[3] *Eastern* was decided on June 25, 1998. Robert filed its initial brief before the court of appeals on June 29, 1998, and filed its reply brief on August 21, 1998.

ing and oral argument, the court of appeals affirmed the district court's decision "substantially for the reasons stated in the district court's memorandum opinion." (Pet. App. 1a.)

ARGUMENT

I. ROBERT FAILED TO PRESERVE THE DUE PROCESS AND TAKINGS CLAUSE ARGUMENTS IT RAISES FOR THE FIRST TIME IN ITS PETITION

The first issue presented in Robert's petition displays a stark discontinuity with Robert's submissions in the district court and in the court of appeals.[4] In its petition, Robert argues that the court of appeals erred in "holding" that this Court's decision in *Eastern* "established only a 'specific result' not binding in any other cases." (Pet. i.) As we demonstrate below, the court of appeals held no

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[4] Counsel of record for petitioners in this Court was not counsel below. He has, however, recently appeared as counsel for LTV Corporation and North American Coal Company as *amici curiae* in other cases raising unsuccessful challenges to the validity of the Coal Act. *Unity Real Estate Co. v. Hudson*, 1999 WL 167765 (3d Cir. March 29, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) ("*ABC*"). LTV and North American failed long ago in their own attacks on the constitutionality of the Coal Act. *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995); *Bellaire Corp. v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997) (Bellaire is a North American subsidiary). Since this Court's decision in *Eastern*, LTV and North American have sought to use other cases as vehicles to reprise their general assault against the Coal Act as applied to post-1974 NBCWA signatories. In each of these cases, LTV and North American have sought to convert narrower attacks on the statute into broader challenges akin to those that LTV and North American unsuccessfully pursued on their own behalf in the past. Both the Third Circuit and the D.C. Circuit have rejected these efforts. *Unity*, 1999 WL 167765 at *9; *ABC*, 156 F.3d at 1257-58. The first question presented in the petition here mirrors the arguments made by LTV and North American in *Unity* and *ABC*. Robert has elected, for some reason, to relegate its own arguments in the courts below to second place and to feature instead arguments not previously advanced in this case but favored by LTV and North American.

such thing, and its decision is entirely consistent with *Eastern*. Before even getting to the merits, however, the argument is not properly before this Court, for at least two reasons.

a. First, the only argument that Robert properly preserved with respect to the constitutionality of the Coal Act under the Fifth Amendment is that the statute is defective because it allegedly interferes with the rights that Robert purportedly obtained as a result of the Settlement Agreement and Stipulated Order. Robert did not argue that the Coal Act as applied to it violated the Fifth Amendment on any other basis, nor did it assert a facial attack on the Coal Act's constitutionality under the Fifth Amendment. Now, for the first time, Robert contends that the Coal Act is "unconstitutional" as applied to it in light of a "legal test" that it claims to derive from the plurality and concurring opinions in *Eastern*. In support of this argument, Robert cites various NBCWA provisions that it never so much as mentioned in the courts below. (Pet. 2-3.) Robert cannot raise such an argument for the first time in its petition when it never before articulated the claim. Moreover, nowhere in its Fifth Amendment argument in this Court does Robert even mention the Settlement Agreement and Stipulated Order that formed the exclusive foundation for its Takings and Due Process Clause arguments in the district court and in the court of appeals. Robert thus has abandoned the only Fifth Amendment argument that it actually made in the courts below.

b. Second, Robert cannot pin its Takings Clause claim on this Court's decision in *Eastern* because Robert itself expressly disclaimed reliance on that decision in the court of appeals, acknowledging that:

> *Eastern* is factually distinguishable since it involved the Combined Fund [as opposed to the 1992 Plan]. Moreover, Eastern had not been a signatory to an

> NBCWA since 1964 [as compared to Robert, which had signed the 1974, 1978, and 1981 NBCWAs].

(Brief of Appellants at 32.) Nor can Robert tie its due process claim to the *Eastern* decision, because it did not even suggest in the court of appeals that *Eastern* had any significance at all to its due process claims. Indeed, Robert did not mention *Eastern* even once in its reply brief before the court of appeals. Robert cannot argue for the first time in this Court that *Eastern* controls this case, when it conceded in the court of appeals that *Eastern* does not control this case.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *EASTERN ENTERPRISES*

Even if Robert's first question were properly before this Court, it provides no basis for review. Robert's argument that the court of appeals improperly refused to follow *Eastern* consists of three parts. First, Robert attempts to cobble together from the plurality and concurring opinions a "holding" of *Eastern* that, Robert claims, demonstrates that the Coal Act is unconstitutional as applied to it. (Pet. 11-13.) Second, Robert argues that the court of appeals refused to follow this purported "holding." (Pet. 13-15.) Finally, Robert struggles to manufacture a circuit conflict. (Pet. 15-16.) Each portion of Robert's argument is significantly flawed.

a. In *Eastern*, a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern Enterprises. 118 S. Ct. at 2146-53 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause applied, but concluded that, as applied to Eastern, the Coal Act violated the Due Process Clause. *Id.* at 2154-60 (Kennedy, J., dissenting in part and con-

curring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 2161-68 (Breyer, J., dissenting). At the same time, although the four Justices in the plurality declined to reach the issue, they expressed serious misgivings "about using the Due Process Clause to invalidate economic legislation." *Id.* at 2153 (plurality).

Although Robert acknowledges, as it must, that there was no opinion for the Court in *Eastern*, it nevertheless contends that this Court "established a general framework" and that Justice Kennedy and the plurality endorsed the "same legal test" for determining when a statute is unconstitutionally retroactive. (Pet. 11.) Applying this "legal test" to itself, Robert concludes that the Coal Act is "plainly unconstitutional" as applied to it. (Pet. 13 n.7.) This reasoning is faulty for several reasons.

To begin with, neither the plurality opinion nor the concurring opinion purported to create any new "legal test" or "framework" for determining whether economic legislation such as the Coal Act is "unconstitutional." Instead, they applied well-established, but different, constitutional principles to the specific case before the Court. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to the petitioner. 118 S. Ct. at 2149 (plurality). Justice Kennedy rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 2158 (Kennedy, J., dissenting in part and concurring in the judgment).

Robert dismisses the disagreement between the plurality and concurring opinions as a mere "theoretical question"

and declares that the plurality and Justice Kennedy were "in complete agreement" as to the "controlling Fifth Amendment retroactivity principles." (Pet. 11.) Studiously avoiding any argument addressed to either the Takings Clause or the Due Process Clause, Robert instead amalgamates the two distinct concepts and simply asserts that its "legal test" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. (Pet. 13 n.7.)

But this is not the way courts determine the validity of statutes. The "common legal principles" that Robert purports to extract from the plurality and concurring opinions in *Eastern* have no independent constitutional status; there is no constitutional right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. Nor is there any basis for Robert's apparent belief that Congress may only enact legislation that imposes obligations that mimic promises already made in contracts. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986) ("contracts, however express, cannot fetter the constitutional authority of Congress") (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935)). Indeed, if there were any such requirement that legislation be duplicative of contractual promises, there would be little impetus to enact legislation.

For this very reason, the Third Circuit in *Unity* recently rejected an identical argument offered by LTV and North American as *amici* in that case:

> *Amici,* other former coal companies, submit that the holding of *Eastern* is that employee benefits funding legislation is unconstitutional if it imposes substantial retroactive liability on selected employers, and if that liability is unrelated to injuries caused or promises made by those employers. While this may be reasonably accurate in a general sense, it does not pro-

> vide guidance for determining how substantial is too substantial or how tight the fit between parties' past acts and the liability imposed on them must be. *Nor does it help define an intersection between substantive due process and takings law, as the word "unconstitutional" is here being used to cover, if not a multitude of sins, at least two.*

Unity, 1999 WL 167765 at *9 (emphasis added). The D.C. Circuit in *ABC* similarly rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "legal test":

> We begin our analysis with a bedrock principle of constitutional adjudication—a principle which appellant either does not accept or is attempting to obscure. The Constitution prohibits certain governmental action through specific clauses—clauses that, with Supreme Court interpretation, have given rise to various and sometimes rather complex doctrines of constitutional law. *Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses.* Appellant's supplemental brief ignores this notion and asserts that, because the Coal Act was held "unconstitutional" in *Eastern Enterprises,* it must be "unconstitutional" here too, supported by an analysis that, so far as we can tell, tracks the three-factor "test" ordinarily used to evaluate challenges under the Takings Clause of the Fifth Amendment. . . . *We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.*

ABC, 156 F.3d at 1253-54 (emphasis added).

By failing to demonstrate—or even to argue—that the Coal Act violates its rights under the Due Process Clause or the Takings Clause, Robert attempts to elevate its purported "legal test" to constitutional status and to obscure the "bedrock principle" that laws are unconstitutional only if they violate a specific clause of the Constitution. Robert's strange approach has properly been rejected by both courts of appeals that have considered post-*Eastern* challenges to the Coal Act, and it does not warrant review here.

b. Robert errs not only in its use of *Eastern* but also in its characterization of what the court of appeals in this case held. Because the court of appeals cited its own earlier decision in *ABC*, Robert contends that the decision here depended on *ABC*. Robert then attacks *ABC* (and, indirectly, the decision below) for insufficient fidelity to *Eastern*, because *ABC* did not adopt Robert's purported "legal test." (Pet. 10.) Robert is wrong, both in its characterization of the decision below and in its attack on *ABC*.

In the first place, Robert's argument is but a straw man, because the court of appeals' decision in this case did not depend on *ABC*. The court explicitly ordered "that the judgment . . . be affirmed substantially for the reasons stated in the district court's memorandum opinion of November 17, 1997." (Pet. App. 1a.) The district court's opinion was issued some ten months *before* the D.C. Circuit's decision in *ABC* and could not possibly have relied on it. When the court of appeals affirmed "substantially for the reasons stated" by the district court, it too could not have been relying on *ABC*. The court of appeals cited *ABC*'s rejection of a due process challenge to the Coal Act only as "further support for the district court's holding" with respect to Robert's due process claim. (Pet. App. 2a.)

Moreover, even if the court of appeals in this case had relied on *ABC*, Robert's argument distorts the plain meaning of the *ABC* decision. Contrary to Robert's suggestion, the *ABC* court did not hold that *Eastern* was of no precedential value. To be sure, the court of appeals stated that "the only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises." *ABC*, 156 F.3d at 1255. Taken in context, the court of appeals clearly meant that the result in *Eastern* is controlling only in cases involving identically-situated coal companies that did not sign the 1974 and later NBCWAs. *Unity*, 1999 WL 167765 at *9 (citing *ABC*). The members of the appellant association in *ABC* were not identically-situated because, unlike Eastern, they remained in the coal business and signed both the 1974 and 1978 NBCWAs. *ABC*, 156 F.3d at 1256. Likewise, the Third Circuit concluded that *Eastern* did not control the outcome in *Unity* because appellants there (or their related persons) had signed the 1974, 1978, and 1981 NBCWAs. *Unity*, 1999 WL 167765 at *4. Robert is also not identically-situated to Eastern because it remained in the coal industry until 1984 and signed the 1974, 1978, and 1981 NBCWAs. As we discuss in detail below, these differences are significant under the various opinions in *Eastern* and distinguish this case from the circumstances addressed there. Moreover, *Eastern* considered only one piece of the funding mechanism for the Combined Fund rather than the different funding mechanism for the 1992 Plan at issue here. *Eastern*, 118 S. Ct. at 2142 n.2; *see also In re Olga Coal Co.*, 159 F.3d 62, 64 n.3 (2d Cir. 1998) ("Because *Eastern Enters.* was unconcerned with § 9712 . . . it does not affect our decision."). Robert fully acknowledged these distinctions in the court of appeals.

In its effort to demonstrate some error justifying this Court's attention, Robert engages in a detailed critique of

the court of appeals' application—not in this case, but in *ABC*—of this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977). (Pet. 13.) Apart from the incongruity of Robert's use of its petition to attack the court of appeals' reasoning in a different case (in which the appellant did not seek certiorari), Robert's criticisms are unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another—only where one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 778 (D.C. Cir. 1991) (en banc); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Id.* at 1058; *see also King*, 950 F.2d at 782 (same).

The court of appeals in *ABC* correctly observed that, "as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis." *ABC*, 156 F.3d at 1255. The Third Circuit came to precisely the same conclusion. *Unity*, 1999 WL 167765 at *9. In such circumstances, only the result in the case before this Court is binding, and only in substantially-identical cases. *Id.*; *ABC*, 156 F.3d at 1254-55. This conclusion is entirely consistent with the plurality and concurring opinions in *Eastern*. *See* 118 S. Ct. at 2153-54 (plurality); *id.* at 2159 (Kennedy, J., dissenting in part and concurring in the judgment).

Finally, Robert is also wrong in its characterization of the court of appeals' reference to the undeniable fact that five Justices in *Eastern* concluded that the Coal Act should not be reviewed under the Takings Clause. The court of appeals did not declare itself bound by the concurrence and dissent; it simply observed that only four Justices in *Eastern* accepted the plurality's takings analysis. Since that view did not command a majority in this Court, it does not bind lower federal courts. This unremarkable conclusion hardly warrants further review.

c. Even if Robert had properly preserved and presented claims under the Due Process Clause and the Takings Clause rather than its generalized claim of "unconstitutionality," *Eastern* would not support Robert's position. The lynchpin of each opinion in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. *Eastern*, 118 S. Ct. at 2142-43 (plurality). Robert, by contrast, actively mined coal until 1984, and signed the 1974, 1978, and 1981 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example, that "[t]he 1974 NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 118 S. Ct. at 2139-40. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor

> agreed to make contributions in connection with the Benefits Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

Id. at 2150 (emphasis added). The plurality then set forth its view of the relevant historical events and concluded that:

> There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's.*

Id. at 2153 (emphasis added).

Justice Kennedy came to the same conclusion in his opinion, concluding that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

Id. at 2159 (emphasis added). Similarly, the four dissenting Justices in *Eastern* agreed that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 2161 (Stevens, J., dissenting) (stating that "their implicit agreement was made explicit in 1974").

If there can be said to be any common theme among the various opinions in *Eastern*, it is surely that the 1974, 1978, and subsequent NBCWAs created a reasonable expectation of lifetime health benefits: "[t]he clear implication of each opinion in *Eastern Enterprises* is that

employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." *ABC*, 156 F.3d at 1257; *Unity*, 1999 WL 167765 at *15-*19.

Robert signed the 1974, 1978, and 1981 NBCWAs and thus helped to foster an expectation of lifetime health coverage. In the courts below, Robert argued that the Settlement Agreement and Stipulated Order operated to cut off those legitimate expectations such that Robert should be allowed to dump its former employees into the 1992 Plan as "orphans," to receive benefits paid for by other coal operators that did not have the foresight to breach their contractual undertakings and then to engage in and settle litigation involving those obligations. In its petition, Robert has abandoned this argument in favor of its claim that it did not create any legitimate expectations to begin with because the NBCWAs it signed "explicitly limited" its commitment "to the respective term of each agreement" (Pet. 2)—an argument that Robert did not make below, that derives no support from any of the opinions in *Eastern*, and that reflects Robert's incorrect belief that congressional authority may be restricted by private contracts. *See Unity*, 1999 WL 167765 at *15. Whatever Robert's argument, however, each of the opinions in *Eastern* makes clear that the judgment there does not govern here.

d. Nor does the court of appeals' decision (to the extent it relies on the decision in *ABC*) conflict in any way with the views of the Fourth Circuit or of the United States. (Pet. 15.) As Robert recognizes, the Fourth Circuit in *Mary Helen Coal Corp. v. Hudson*, 1998 WL 708687 (4th Cir. Sept. 24, 1998) (table), faced a case that was "materially indistinguishable" from *Eastern*. (Pet. 15); *Mary Helen*, 1998 WL 708687 at **1. Like

Eastern—but unlike Robert—Mary Helen had terminated its coal mining operations in 1963 and the last NBCWA Mary Helen signed was in 1950. *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366, 369 (E.D. Va. 1997). Similarly, the court of appeals' decision here in no way conflicts with the fact that the Commissioner of Social Security has revoked the assignment of retirees of a number of identically-situated coal operators in the wake of *Eastern*, because Robert is admittedly not identically-situated. Robert's attempts to concoct a circuit conflict are without merit.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE COAL ACT DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES

Relying on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Robert claims that the Coal Act "nullifies" the "final judgment" entered in the Kentucky litigation. (Pet. 16.) This argument rests entirely on an inflated and plainly incorrect view of the Settlement Agreement and Stipulated Order. It is fatally deficient for at least three reasons.

First, as the district court correctly held, the Settlement Agreement did no more than resolve a private contractual dispute between Robert and the UMWA. (Pet. App. 14a.) It released Robert from any contractual obligation to contribute to the UMWA 1950 and 1974 Benefit Plans. The Coal Act, in contrast, imposes a new, statutory obligation to contribute to the 1992 Plan. The Settlement Agreement did not purport to release Robert from future statutory obligations, nor could it have done so:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights or property, but when contracts deal with a subject matter which lies within the control of

> Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 307-08 (1935), quoted with approval in *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993), and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986). That the Settlement Agreement was approved by a court does not change the result: "Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise, the paramount powers of Congress could be nullified by 'prophetic discernment.' The rights acquired by judgments have no different standing." *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947). The plurality in *Eastern* acknowledged this point, stating that "[o]ur opinions in [*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)], *Connolly*, and *Concrete Pipe*, make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties." 118 S. Ct. at 2149. The Coal Act itself explicitly leaves undisturbed pre-Coal Act contractual obligations. *See* 26 U.S.C. § 9708.

Second, to the extent Robert has any rights as a result of the dismissal of the Kentucky litigation, those rights arise from the Settlement Agreement, and are limited by the terms thereof. The Kentucky litigation involved the UMWA's claim that Robert had breached its obligation to ensure continued health coverage for its retirees as required by the successorship clause in the 1981 and 1984 NBCWAs. (Pet. App. 42a.) That is the claim that Robert and the UMWA settled. The Settlement Agreement precluded any claim by the UMWA that Robert was responsible for paying for health benefits "arising

out of any Wage Agreement." (Pet. App. 44a.) The Coal Act does not disturb that outcome; it does not impose on Robert any obligation arising under the NBCWA or any other wage agreement. Rather, it imposes a new statutory obligation to pay for the benefits provided in the Coal Act. Nor does this case concern any claim by the UMWA; the claim is brought by the Trustees of one of the two new private plans created under the statute.

The Fourth Circuit rejected a similar claim to that presented by Robert in *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996). There, the appellants argued that a settlement between them and the trustees of the 1950 and 1974 UMWA Benefit Plans releasing the appellants from future liability to those plans, barred enforcement of the Coal Act as to them. *Id.* at 742. The court rejected the argument:

> As appellants concede, neither the 1992 Plan nor its Trustees were parties to this previous settlement. They therefore cannot be legally bound by its terms. Moreover, they could not possibly have been parties to the settlement because it was executed, and the action dismissed, before Congress had even passed the Coal Act. In addition, appellants provide no legal authority for the proposition that a contract between private parties can relieve one of them from statutory obligations such as those imposed by the Coal Act.

Id. Similarly here, the Trustees cannot be bound by the terms of the Settlement Agreement because they were not parties to it, and because the Settlement Agreement did not even purport to release Robert from future statutory obligations.

Third, the Stipulated Order in the Kentucky litigation by its terms did not grant Robert any rights at all. It simply dismissed the lawsuit with prejudice because the parties had reached a settlement. (Pet. App. 40a.)

Because the Stipulated Order did not grant any rights to Robert, the Coal Act cannot violate any such rights. In short, although Congress could not, consistent with this Court's decision in *Plaut*, order the Kentucky district court to revive the UMWA's 1988 lawsuit against Robert, the Coal Act does no such thing. The Coal Act does not order the re-opening of the Kentucky litigation or the revival of any claims by the UMWA, and it therefore implicates no separation-of-powers issue.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE SETTLORS AND TRUSTEES OF THE 1992 PLAN ARE NOT "OFFICERS OF THE UNITED STATES" FOR PURPOSES OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

Robert's final argument likewise does not warrant further review. The claim that the Coal Act violates the Appointments Clause is premised on a non sequitur; because the Coal Act created the 1992 Plan and provided for the appointment of the Trustees, Robert asserts that the Settlors and Trustees of the 1992 Plan are *ipso facto* "Officers of the United States" and that every activity of the Trustees is necessarily an exercise of "governmental authority." Robert's conclusion does not follow.

This Court established long ago the contours of the term "Officers" as used in the Appointments Clause of the Constitution. An "office" is a "public station, or employment, conferred by the appointment of government." *United States v. Hartwell*, 73 U.S. 385, 393 (1867). That term "embraces the ideas of tenure, duration, emolument, and duties [that are] continuing and permanent, not occasional or temporary." *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (citing *Hartwell*, 73 U.S. at 393). Only appointees who exercise "significant authority pursuant to the laws of the United States" are "Officers of the United States" under the Appointments

Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Trustees are not "Officers" under these standards.

a. First, neither the Settlors (the UMWA and the Bituminous Coal Operators' Association, Inc. (*see* 26 U.S.C. §§ 9701(b)(2), 9712(a)(1)) nor the Trustees hold any "public station, or employment" conferred by the government. *Hartwell*, 73 U.S. at 393. The Coal Act expressly provides that the 1992 Plan is a "separate private plan." 26 U.S.C. § 9712(a)(1). It is also a plan within the definition of the Labor Management Relations Act of 1947 and an "employee welfare benefit plan" and a "multiemployer plan" within the meaning of ERISA. 26 U.S.C. § 9712(a)(2). Both of those statutes deal with private plans. The Settlors are a labor union and a multiemployer bargaining association, neither of which has any governmental role or connection. The Trustees are fiduciaries for the beneficiaries of the 1992 Plan, and they have the same responsibilities as the administrators of any private health benefit plan. *Cf. Communications Satellite Corporation*, 42 Op. Att'y. Gen. 165, 169-70 (1962) (incorporators and directors of federally-chartered corporation hold only a private station and thus are not "Officers" where they "have the same status and responsibilities as individuals serving on the board of an ordinary business corporation," and their obligation is the "furtherance of private interests"). The Trustees have no employment relationship with the government and are not compensated by the government. They thus hold not a public, but only a private station. *See Germaine*, 99 U.S. at 512 (emolument test not met where no "regular appropriation is made to pay" compensation); *cf. Hartwell*, 73 U.S. at 393 (compensation fixed by law).

b. Second, the Trustees do not have the sweeping authority attributed to them in the petition, and what authority they do have is not "governmental" authority. Robert asserts that the Coal Act provides the Trustees

"broad power to determine, assess, and collect monthly premiums from former NBCWA signatories," as well as the power to "determine whether an individual is eligible to receive benefits from the 1992 Plan." (Pet. 6, 22.) This is a serious overstatement. Congress itself, through the express terms of the Coal Act, determined what premiums should be assessed by the 1992 Plan and who is eligible for benefits. 26 U.S.C. § 9712(b)(2), (d)(1)-(3). The Trustees have no authority to assess premiums other than those prescribed by Congress or to expand eligibility beyond that intended by Congress.

Similarly, Robert states that the Trustees determine "what former NBCWA signatory is responsible for financing those benefits." (Pet. 6, 22.) This statement disregards the statute. Congress, not the Trustees, has decided that "[a]ny last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium" for each beneficiary for whom that operator was the last coal industry employer. 26 U.S.C. § 9712 (d)(3). The Trustees have no power to deviate from that congressional mandate, nor do they. The Trustees simply perform the ministerial act of checking records to see which coal industry employer was the last signatory operator to have employed a particular retiree.

Robert also asserts that the Trustees exercise substantial authority to determine "fundamental design features of the 1992 Benefit Plan" (Pet. 22), apparently referring to such statutorily prescribed items as the development of managed care and cost containment rules, implementation of a prescription drug program, arranging for price discounts in exchange for patient volume and preferred provider status, and "selecting the most efficient physicians and state-of-the-art utilization management techniques . . . ." 26 U.S.C. § 9712(c)(2), (3). Although such activities are certainly important to the func-

tioning of any health plan, they assuredly are not "governmental" powers. To the contrary, they are no more than the administrative powers—common to any private health plan—to design rules and procedures to ensure the proper functioning of the plan. In the same way, the authority of the Settlors to appoint and remove Trustees and to provide for the "structure, administration, and terms" of the 1992 Plan (*see* 26 U.S.C. § 9712(a)(1)) is no different from the authority that a union and multiemployer bargaining group would exercise with respect to any multiemployer Taft-Hartley health benefit plan.

Nor is the Trustees' role in calculating 1992 Plan premiums in any way governmental. The Coal Act mandates that the 1992 Plan provide health benefits that are "substantially the same as" those provided under the 1950 and 1974 UMWA Benefit Plans as of January 1, 1992. 26 U.S.C. § 9712(c)(1). The Coal Act then provides that premiums shall be assessed against each last signatory operator based on the number of beneficiaries attributable to it, 26 U.S.C. § 9712(a)(1), (3), and that those premiums shall be subject to such adjustments as are necessary "to cover changes in the cost of providing benefits to eligible beneficiaries." 26 U.S.C. § 9712(d)(2)(B). In short, the function of the Trustees in calculating the amount of premiums involves little more than the arithmetical task of dividing the cost of benefits by the number of beneficiaries to determine a per beneficiary premium. It does not make the Trustees governmental officers.

The fact that the Trustees have the power to bring legal actions to enforce coal operators' obligations to the 1992 Plan does not undermine the conclusion that the Trustees are not "Officers" of the United States. Their power to sue is no different from the power of the settlors or trustees of any other private plan to sue to enforce the obligations imposed by that plan. *Buckley v. Valeo*, 424

U.S. 1 (1976), is not to the contrary. *Buckley* did not hold that the power to seek judicial relief automatically rendered the members of the Federal Election Commission "Officers." Rather, the Court said, the commissioners' "primary responsibility for conducting civil litigation in the courts of the United States *for vindicating public rights*" violated the Appointments Clause because such vindications of public rights may only be carried out by persons who are "Officers of the United States." *Id.* at 140 (emphasis added). Because the Trustees' power to seek judicial relief vindicates the *private* rights of the beneficiaries of the 1992 Plan and not the rights of the general public, the Trustees are not "Officers" within the meaning of the Appointments Clause.

The cases Robert cites in support of its position are plainly inapposite. In each case, the appointee had inherently governmental responsibilities, as contrasted with the purely private responsibilities of the Trustees. *See, e.g., Buckley*, 424 U.S. at 136-38 (enforcement of federal election laws); *Weiss v. United States*, 510 U.S. 163, 169 (1994) (military judges); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 880-82 (1991) (special trial judges); *Morrison v. Olson*, 487 U.S. 654, 671-72 & n.12 (1988) (independent counsel); *Myers v. United States*, 272 U.S. 52, 173-74 (1926) (postmaster); *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880) (election supervisor); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 228 (1839) (district court clerk).

Robert's argument (Pet. 24) that assessments imposed by the Coal Act have been held to be "taxes" for purposes of the Bankruptcy Code is beside the point. Coal Act assessments are treated as "taxes" under the Bankruptcy Code, but they are taxes imposed by Congress, not the Trustees. To label the Trustees "Officers of the United States" simply because they collect the assessments would

similarly elevate to constitutional status the owner of every gas station that collects gasoline taxes, every employer who collects social security taxes, and anyone else who collects any tax imposed by Congress. Neither *Buckley* nor the Appointments Clause contemplates any such result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 1999